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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

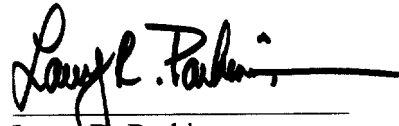
**1998 Biennial Regulatory Review
Review of International Common Carrier
Regulations**

IB Docket No. 98-118

Dear Ms. Salas:

Enclosed for filing please find an original and nine copies of the Federal Bureau of Investigations' Reply Comments to the Commission's captioned Notice of Proposed Rulemaking.

Sincerely,



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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

1998 Biennial Regulatory Review
Review of International Common Carrier
Regulations

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IB Docket No. 98-118

REPLY COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION

The FBI welcomes the opportunity to offer Reply Comments regarding the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (NPRM) with respect to International Common Carrier Regulations, IB Docket No. 98-118.

A. Blanket Section 214 Authorization for International Service to Unaffiliated Points

1. Having reviewed the comments in this Docket provided by common carriers, telecommunications carrier trade associations, and the Department of Defense, the FBI continues to assert its principal objection set forth in its original Comments:¹ many of the "regulatory relief" proposals, as set forth in the Commission's NPRM, go too far. Such proposals are contrary to law and the "public interest" in that they erode or eviscerate substantive provisions found in the very statutes and regulations from which they arise. Section 214 requires carriers seeking to provide international service to apply for and obtain Commission certification and authorization *prior to offering* international service. It also provides certain Executive Branch agencies with a statutory right to be heard *before certification*. These statutory mandates are essential "safeguards" upon which law enforcement, national security, and other entities rely to

¹ Comments of the Federal Bureau of Investigation, *In the Matter of 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations; Notice of Proposed Rulemaking, IB Docket 98-118*, filed August 13, 1998.

prevent potentially irreparable harm to the public interest. In enacting these provisions, Congress created a “bright line” rule prohibiting carriers from offering international service, etc., without first obtaining Commission certification. Section 214 clearly states Congress’ intent for the Commission, prior to granting certification, to consider Executive Branch input on law enforcement and national security matters as part of its “public interest” analysis and determination. The NPRM at issue dismisses, by regulation, Congress’ clearly stated intent for pre-service offering review and certification.

2. The Comments submitted by the Secretary of Defense in the instant NPRM support the views of the FBI. At the very outset, the Secretary of Defense’s Comments state: “[w]hile the Department of Defense (DoD) understands the Commission’s attempts to eliminate unnecessary paperwork and effort, national security concerns must be addressed before the proposals can be adopted.” (Emphasis added).²

3. As the Secretary of Defense notes, in implementing the World Trade Organization (WTO) Basic Telecommunications agreement, the Commission concurred with DoD’s assertion that there “should be no assumption in favor of approval applied with respect to a public interest review for national security.”³ (Emphasis added). The Commission, in its decision in the WTO matter, agreed to seek input from the Executive Branch on matters of national security, law enforcement, foreign policy and trade prior to the issuance of authority to allow a foreign owned carrier to operate in the United States.⁴

² See Comments of the Secretary of Defense at 1-2.

³ See Comments of the Secretary of Defense at 2.

⁴ Id at 2.

4. As indicated in the FBI's original Comments, the Commission's proposals, on their face, conflict with the Commission's own previously stated position as well as the black letter statutory requirements stated in Section 214. The FBI agrees with the Secretary of Defense's observations with regard to a pre-grant review and also questions how the proposed blanket Section 214 authorization would comport with the Commission's previously stated position.⁵

5. The FBI further concurs with the Comments of the Secretary of Defense when they raise the question of the Commission's statutory authority under Section 214 to grant blanket authorizations for international carrier service, and thereafter "condition" a license or certification following a post-certification review.⁶ Moreover, this very real and troubling question as to the ability to condition or revoke a license, once granted, undermines one of the Commission's own rationales and justifications supporting its proposal for blanket Section 214 authorization for unaffiliated points which explicitly recognizes the Executive Branch's interest in these matters.⁷ As stated in the FBI's earlier comments, practically speaking, such post-service offering review and right to be heard may well be too little and too late. As noted here, the proposed procedure and its purported allowance for "conditioning" previously-granted authorizations may be legally suspect as well.

6. The comments submitted by AT&T also support the FBI's assertion that review

⁵ Id at 3.

⁶ Id. at 4.

⁷ See NPRM, at 7, paragraph 10, "We may also need to review (in consultation with Executive Branch agencies) any given carrier's authorization for national security, law enforcement, foreign policy, and trade concerns."

prior to offering service and a right to be heard prior to authorization must be maintained.

Although AT&T focuses on potential competitive harm caused by the proposals and on specific provisions of the *Foreign Carrier Entry Order*,⁸ AT&T speaks broadly in terms of the need for pre-service (pre-entry) review:

As further proposed by the Notice (para. 10), the Commission will merely receive notification that the carrier is providing service after it has begun to do so. *Such after-the-fact notification would not only fail to allow adequate public interest oversight, [emphasis added] which the Commission has repeatedly found to require pre-entry [emphasis in the original] review [footnote omitted], but may also prejudge the outcome. As the Commission has found, it can be 'impracticable to withdraw[] service, once established, because of its disruptive effect [on consumers].'* [Footnote omitted].⁹

As AT&T recognizes, and the Commission itself has found, once the provision of service begins, the issue of certification is no longer exclusively between the carrier and the Commission. An attempt to revoke or condition a Section 214 authorization after service has commenced will likely place the interests of unwary subscribers directly at odds with the law enforcement, national security, foreign policy and trade interests of the United States. The Commission's proposal, therefore, runs the very real risk of unintentionally creating the conundrum of having to accommodate compelling and conflicting Section 214 public interest claims (*e.g.*, a national security or law enforcement-based insistence on revocation of a license and a subscriber community-based insistence upon non-interruption of service).

7. Although Section 214(a) provides the Commission with the right to lawfully

⁸ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, (rel. Nov. 26, 1997), FCC 97-398 ("Foreign Participation Order"), para. 50.

⁹ AT&T Comments at 4-5.

authorize the temporary or emergency discontinuance, reduction, or impairment of service,¹⁰ Congress specifically attempted to prevent the adverse impact of a post authorization disruption of service when it enacted the provisions of Section 214(b) requiring pre-certification review and opportunity to be heard by the Executive Branch. Therefore, if adopted, the Commission's proposals are likely to create substantive problems which, as noted immediately above the Congress had procedurally averted and solved, by creating a situation whereby customer service must be disrupted in order to serve significant national security, law enforcement, foreign policy or trade interests asserted, post-authorization, by the Executive Branch. The only prudent course of action to avoid such a situation is to continue the existing pre-authorization public interest review and right to be heard.

8. The FBI continues to oppose enlarging the proposed blanket authorization from unaffiliated to affiliated carriers or to any class of carrier. The Secretary of Defense's Comments support this position. The Secretary of Defense's Comments regarding the Foreign Participation NPRM and the Comments previously submitted by the FBI make it clear that neither competition, market power in destination markets, nor WTO membership have a material effect upon national security analysis and determinations.¹¹ While the FBI strongly opposes the granting of blanket Section 214 authorization for international service to unaffiliated points, the FBI agrees with Ameritech, MCI Telecommunications Corp., Primus Telecommunications, Inc., and WorldCom, Inc. that such an authorization would be a better approach than forbearing

¹⁰ 47 U.S.C. section 214(a) provides: "[n]o carrier shall discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby...).

¹¹ See FBI Comments at 7.

altogether the application of the requirements of Section 214.¹² In any event, either approach contravenes the black letter requirements of Section 214 as well as the public interest

9. The Commission should also note that the carriers and telecommunications trade associations failed to consider in their comments to this NPRM the well recognized fact that the "public interest" analysis and determination required under 47 U.S.C. sections 214, 160-161, properly include components beyond economic competition: *inter alia*, national security, law enforcement, foreign policy and trade. Although the carriers and trade associations were nearly unanimous in their support for the instant NPRM proposals based solely upon the single factor of economic competition, the FBI trusts the Commission will recognize this unduly narrow perspective when evaluating the weight to be assigned to their comments, and consider a thorough analysis of the public interest.

B. Forbearance from Pro Forma Assignments and Transfers of Control; and

C. Provision of Service by Wholly Owned Subsidiaries

10. The FBI also opposes the Commission's proposal for forbearance with regard to *pro forma* transfers and assignments, particularly those involving an "assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa." Although such corporate changes may not impact a competitive market analysis, they could dramatically and adversely affect issues related to national security and law enforcement under a thorough public interest analysis. None of the carriers nor the trade associations who provided comments on the proposed rules properly analyzed the forbearance provisions in accordance with *all* of the public

¹² See Ameritech Comments at 4, n. 7; MCI Comments at 3; Primus Telecommunications, Inc. Comments at 2; and WorldCom, Inc. Comments at 1.

interest factors contemplated by 47 U.S.C. sections 214 and 160(a)(3).

11. Some commenters would have the Commission completely eviscerate the existing regulatory regime with provisions more expansive than those already proposed. For example: Ameritech stated there was no need to place "notification letters" on public notice because they would raise no substantial public interest issue;¹³ Primus Telecommunications, Inc. suggested there is no need for carrier notice at all, to include "consummation" letters;¹⁴ WorldCom, Inc. would have the Commission include Title III earth stations and cable landing licenses in the proposed streamlining revisions;¹⁵ and several carriers recommended including "sister" affiliates under the rubric of *pro forma* assignments and transfers.¹⁶ Adoption of these recommendations would essentially eliminate any meaningful post-assignment/transfer review and further undermine the Commission's oversight capabilities by removing from the Commission timely knowledge of who the carriers in the marketplace are at any given point in time. It is quite plausible, under these proposals, that subscribers complaining to the FCC about "Carrier X" could find the FCC unable to readily identify "Carrier X", let alone provide any meaningful information about it. Providing notice with annual reports would be even less acceptable inasmuch as any meaningful post assignment or transfer review could potentially be delayed for nearly a year after the corporate change is effected.

12. The FBI strongly opposes the Commission's proposal providing that Section 214

¹³ See Ameritech Comments at 7, n. 12.

¹⁴ See Primus Telecommunications, Inc. Comments at 3-4.

¹⁵ See WorldCom, Inc. Comments at 2-3.

¹⁶ See, e.g., Cable & Wireless Comments at 5-6; GTE Comments at 5; MCI Comments at 6; and WorldCom, Inc. Comments at 3.

authorization effectively authorizes the international carrier to provide services through its wholly owned subsidiaries. Similar to "sister" affiliates, the provision of service by wholly owned subsidiaries, while appearing to be a *pro forma* economic assignment or transfer, could, in reality, present substantive law enforcement or national security concerns. For example, it is quite likely a large internationally prominent carrier which is not objectionable *per se* would have scores of wholly owned subsidiaries throughout the world. Service provision by the carrier personnel, etc. of a subsidiary from certain countries could raise significant law enforcement and national security concerns and, therefore, would be completely unacceptable under a thorough public interest analysis. Clearly forbearance, in certain circumstances, would *not* be in the public interest as required by 47 U.S.C. section 160. Post transaction carrier advisements are quite simply too little, too late.¹⁷

D. Authorization to Use All Non-U.S. Licensed Submarine Cables and Simplification of International Section Exclusion List; and

E. Section 214 Authorizations for Construction of New Submarine Cable Facilities.

13. The FBI continues to support the Commission's proposal to eliminate duplicative filings and reviews for submarine cable systems when adequate Executive Branch *pre-service offering* opportunity for notice and a right to be heard exists in accordance with the Submarine Cable Landing License Act, 47 U.S.C. sections 34-39

14. The FBI also supports the proposal offered by DoD in its original Comments that would require the applicant for a cable landing license to identify the owner of the cable landing station to be utilized and the owner's citizenship. The FBI agrees with DoD's recommendation

¹⁷ See FBI Comments at 11-13.

that such information be included in the application itself.¹⁸

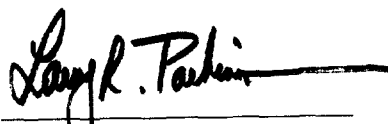
15. The FBI is supportive of removing needless regulatory redundancies under the auspices of this NPRM when no public interest concerns are at issue. However, it is inappropriate to interject into this NPRM any discussion relating to "presumptions" with regard to non-U.S.-licensed cable landing systems. In recent years, DoD has demonstrated a laudable openness to accept non-U.S.-licensed cable systems where, after a pre-service offering license review, there is no national security-based objection. Maintaining pre-service review and the right to be heard is imperative for any national security or law enforcement entity, such as DoD or the FBI. Notwithstanding an openness to accept non-U.S.-licensed cable systems, no presumption issue should be considered or decided in this docket, as is suggested at 12, in paragraph 25 of the NPRM: "the presumption should now favor permitting the use of non-U.S.-licensed cable systems." The FBI strongly objects to any such presumption, particularly in the context of this regulatory relief NPRM. Again, as with much of the basis of this NPRM, economic competitiveness is only a factor in a thorough public interest analysis and determination; there are numerous other interests including national security, law enforcement, foreign policy, and trade which are equally, if not more, important than economic competitiveness. In the end, economic competitiveness has little or nothing to do with national security or law enforcement considerations. Any public interest analysis that does not consider all of these factors is incomplete.

16. The FBI agrees with the Commission's tentative conclusion not to treat satellite-based matters as part of the blanket authorization or forbearance proposals discussed in the

¹⁸ See DoD Comments at 7.

instant NPRM. As asserted by PanAmSat Corporation, satellite-related matters require Section 214 authority for the use of any non-U.S. licensed satellite system; the DISCO II regime providing for pre-service offering review and a right to be heard should continue to be utilized.¹⁹ The same regime should apply to U.S.-licensed satellite-based carriers.

Respectfully submitted,

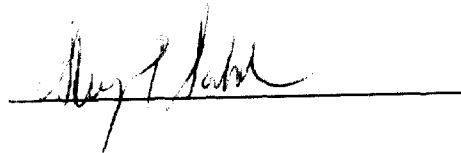


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¹⁹ See PanAmSat Corporation Comments at 2.

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